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The cry of the harassed supervisor — "Dammit, don't just stand there; do something, even if it is wrong!" — is a desperation-born admonition that could well be the anguished plea of black and other teachers of color, called out from increasingly tenuous positions on the faculties in America's mainly white law schools. Consider the facts. The modest but measureable growth in the number of black and brown teachers on the faculties of white schools that climbed from almost none to 200 in the last 15 years has stagnated and is now in decline.[1] Moreover, a conference of Minority Law Teachers held at the University of San Francisco Law School in October, 1985,[2] found teachers of color suffering the same debilitating work tensions, isolation and alienation reported by their predecessors in the early 1970s.[3] The SALT Re-

1. The sad statistics are contained in *Society of American Law Teachers Statement on Minority Hiring in AALS Law Schools: A Position Paper on the Need For Voluntary Quotas* (1984) [hereinafter cited as *SALT report*]. In summary, the report finds that among the 92 AALS schools responding to a SALT survey, there were "28 schools with no minority faculty and 32 schools with only one. Another 20 schools have two minority faculty members." Excluding the four historically black schools, Howard, North Carolina Central, Southern, and Texas Southern, "there are only 14 schools with more than two minorities; (10 schools with three, 3 with four and 1 with five) with minorities in these schools representing from 4% to 11% of the faculty." *Id.* at 1. It is not wild surmise to assume that these figures would not be much improved had the approximately 50 non-responding schools submitted data on their other-than-white faculty members.

2. The papers presented at the conference will be published in a future edition of the San Francisco Law Review.

3. *See, e.g., Report of Conference of Minority Administrators and Law Teachers, Northwestern University School of Law* (1976) [hereinafter cited as *Northwestern*

port describes them as "token presences on their campuses, assuming the multiple burdens of counselor to minority students, liaison to the minority community, and consultant on race to administration and colleagues, while working to establish themselves as effective teachers, productive scholars and congenial colleagues."[4]

Those of us who accepted teaching positions in white law schools back in the early 1970's, saw ourselves as pioneers, creating exciting new careers for ourselves, and opening up previously closed opportunities for other black and brown lawyers who followed us. We realized that the challenges would be great, the chances for failure numerous, and the strain and stress enormous. But we had been choosen, and we were determined to overcome.

Now, we realize that the initiation period never ended. Minority teachers entering the profession today are able to testify from personal experience as they agree with the complaint of a black teacher who reported a decade ago:

> [Y]ou cannot get away from the fact that there is a presumption that a minority is incompetent. The minute you walk into a classroom the question is asked, 'Why are you there?' The reason you are in a law school is because of an affirmative action program. An affirmative action program has been defined as 'lowering the standards to allow us in'. Therefore, you have a burden and you cannot get away from it.[5]

Of course, the sense of many in the law school community that teachers of color gained their jobs by virtue of affirmative action policies rather than by meeting traditional measures of merit does not deter assignment of every imaginable representational role. "We knew you would want to serve on this committee, work with the minority students on their annual conference, speak to this black student who is having trouble with torts, and mediate the differences between the minority students and Professor X who inadvertently told a racist joke in class."

The list is endless and would easily occupy the fulltime of an assistant dean. And yet such extracurricular duties are seen as part of the minority teacher's job . . . until, of course, the time arrives to evaluate

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Minority Law Conference]; BELL, *The Black Lawyer as Law Teacher*, MINORITY OPPORTUNITIES IN LAW FOR BLACKS, PUERTO RICANS & CHICANOS 63 (1974).

4. *Supra* note 2 at 1.

5. *Northwestern Minority Law Conference* at 21. (Emphasis in the original).

the teacher for promotion and tenure. Then, the entire focus of review is on the quality of the teaching and writing. Either no allowances are made for the compromises to scholarly activity resulting from time devoted to racial representational roles, or the estimates made for such activity wholly underestimate both the time and energy expended in trying to compensate single-handedly for the school's inability to create a decent learning environment for students who for so many years were entirely excluded or admitted under the token policies now utilized to hire black and brown faculty.

And yet the value of racial and ethnic diversity in law teaching has not diminished. Given the increased racial tensions in the nation and around the world, the need for the special expertise and the hard-earned perspective of black, Hispanic, Asian, and Indian law teachers has increased as their representation declines. Clearly, we need to do something even if at first glance it seems unrealistic and unorthodox.

Let us examine the problem closely. First, most law school deans and faculty concede the inadequacy of the token one or two minorities on their faculties, but claim they simply cannot find qualified minority candidates.[6] It does take earnest effort to find minority candidates with teaching potential, but the record too clearly shows that most law schools do not aggressively search for minority candidates until pressure from minority students and liberal white students and faculty makes such a search politic if not essential. When undertaken with vigorous commitment, able persons are located, recruited, and hired.

Probably with this experience in mind, the SALT report urged law schools to hold "designated positions open until they are filled by high caliber minority faculty."[7] The response from law school administrators was predictably negative. Critics viewed the recommendation as unproductive given the small pool of qualified minority candidates, impolitic given the current opposition to affirmative action policies, and possibly unconstitutional given the likely view of a Supreme Court majority about the validity of building specific racial quotas into a graduate school's admissions policies.[8]

The counter-arguments seem sufficient to those deans and faculty members whose interest in an enhanced minority presence has been di-

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6. *See, e.g.*, Kaplan, *Hard Times for Minority Profs*, NAT'L L. J., Dec. 10, 1984, at 1 (commenting on the *SALT report* and opposing its recommendation of "voluntary quotas" because of the paucity of qualified candidates).

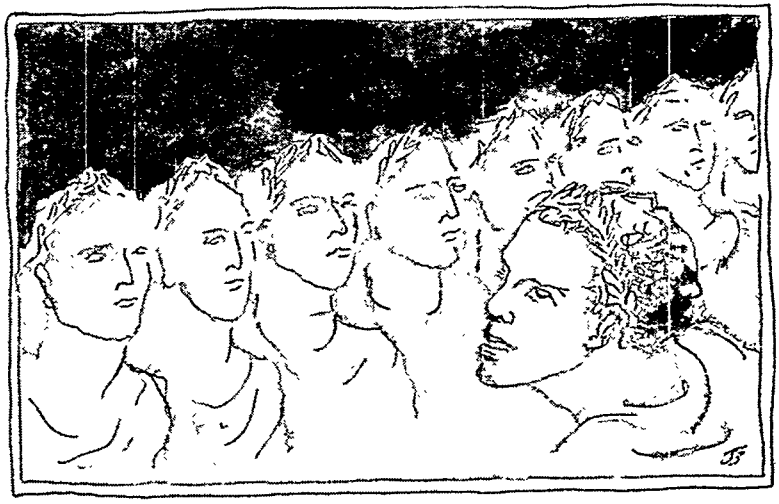
7. *Id.*

8. Regents of the University of California v. Bakke, 438 U.S. 265 (1978).

luted in recent years by tightened budgets and declining student enrollments. Students, black and white, are less willing to risk their academic class standing to engage in prolonged campaigns for minority faculty. Resistance to the hire-someone-or-else tactics have tightened, and even successful drives sometimes result in pyrrhic victories when newly-appointed minority faculty members announce that since they were "hired on their merits" they owe no special obligation to administer to the needs of minority students.

It is clear. A continued reliance on pragmatic considerations in the current, conservative, political environment will reduce the number of minority teachers coming into legal education to a barely discernible trickle. In addition, it will tighten the pressures on existing teachers of color with the predictable result that each year their numbers will decrease. One of the most painful aspects of this decline is the realization by those holding positions that their very presence on the faculty constitutes a barrier to hiring other black or brown teachers, undermining even their most strenuous minority-hiring efforts.

It is not easy to describe the feeling of despair when the faculty rejects a qualified teacher of color who you know full well they would quickly hire were you to suffer a heart attack and drop dead. "Is it," the minority teacher wonders, "that I am doing such a good job that they see no need to hire others like myself? Or is it, rather, that my performance is so poor that they refuse to hire anyone else for fear of making another serious mistake?"



Need to hire people of color

Whatever conclusion the teacher of color reaches, it is unavoidable that he or she is less a pioneer blazing a trail for those who follow than an involuntary barrier whose token presence has removed whatever onus is borne by an all-white institution. Actually, and paradoxically, if the first minority teacher's performance is very good, it will be harder rather than easier to convince the faculty to hire a second nonwhite teacher. Even this "let's not test our luck" attitude is condescending and far from a compliment.

In a recent law review article, I examined the fantasy inherent in American racial issues.[9] The piece relies heavily on fiction and uses a narrative style throughout most of its length. In one allegorical story, *The Chronicle of the DeVine Gift*, a lone, black teacher in a prestigious law school is weary from overwork, and frustrated at her inability to find other teachers of color with qualifications acceptable to the faculty. But with recruiting help from a secret foundation, she is able to produce five highly-qualified black, Hispanic, and Asian candidates. When it appears the minority teachers may reach 25 percent of the faculty, the school calls a halt and refuses to hire an outstanding black applicant.

The ensuing discussion reviews arguments the law school might use to defend its refusal to hire the minority candidate in the unlikely event that a court found the candidate of color more qualified than his white counterpart. Among these, the school argues that it has a larger percentage of minority faculty than any of its competitors, that an even greater number will alter the school's image and jeopardize its recruitment of students, faculty, and its alumni support. In effect, the law school argues, "our record of minority hiring is the best in the country and we should not be required to do more until other institutions do as much."

Public housing authorities and private apartment developers offer quite similar justifications for limiting the percentage of minorities permitted to rent or purchase housing in a particular residential area or apartment complex. Housing people's fear to exceed this percentage will convince whites that the neighborhood is "turning" or "tipping" from white to black or Hispanic. Action based on this conviction turns a fear into a self-fulfilling prophesy. "The tipping theory," according to one review of the phenomenon,[10] "posits that every community has a

9. Bell, *Foreword: The Civil Rights Chronicles*, 99 HARV. L. REV. 4 (1985).

10. Note, *Tipping the Scales of Justice: A Race-Conscious Remedy for Neighborhood Transition*, 90 YALE L. J. 377, 379 (1980).

'tipping point,' a specifiable numerical ratio of blacks to whites beyond which the rate of white migration out of a transitional area will increase rapidly, eventually yielding a predominantly black community."[11] Courts have approved the policy on the grounds that it furthers the national goal of integrated housing. And several legal commentators have expressed support for "tipping" policies because they would "effectively prevent resegregation by keeping the number of blacks just below the point at which mass exodus is expected to occur."[12]

Anthony Downs explains the tipping point phenomenon as a desire by whites for middle-class dominance.[13] White people tend to confuse ethnic and socioeconomic status because a high proportion of minorities are low-income persons. But basically, according to Downs, the middle-class wishes to "protect the quality of life it has won for itself through past striving and effort."[14] In his view, the middle-class dominance goal of whites can be achieved without completely excluding minorities because "white insistence on what amounts to 'neighborhood racial dominance' does not bar the establishment of stable racially integrated areas."[15]

The parallels are not exact, but it is clear that something other than a total commitment to merit motivates law faculties when they hire and promote. Merit and tenure are contradictions. Tenure serves many functions deemed worthwhile by most teachers, but merit is hardly one of them. Any rational commitment to fielding the best possible faculty would use selection processes that involved frequent evaluations and comparisons with all who sought the positions of those holding them.

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11. *See, e.g.*, Otero v. New York City Hous. Auth., 484 F.2d 1122, 1140 (2d Cir. 1973) (limitation on number of minorities permitted to rent apartments approved on finding that the action "is essential to promote a racially balanced community and to avoid concentrated racial pockets that will result in a segregated community.") Litigation over the validity of a "benign quota" limiting minorities to 36 percent of a 5,881-unit, 46-building rental project in Arthur v. Starrett City Assocs., 79 Civ. 3096 (ERN) (E.D.N.Y. Apr. 2, 1985), was settled under a consent decree requiring defendants to provide an additional 175 apartments for minorities over five years.

12. Navasky, *The Benevolent Housing Quota*, 6 HOW. L. J. 30 (1960). *See also* Ackerman, *Integration for Subsidized Housing and the Question of Racial Occupancy Controls*, 26 STAN. L. REV. 245, 308 (1974) ("Policy arguments and empirical analysis support the case for using benign quotas in federally subsidized housing projects.")

13. SENATE SELECT COMMITTEE ON EQUAL EDUCATIONAL OPPORTUNITY, PART 5: DE FACTO SEGREGATION AND HOUSING DISCRIMINATION 2966 (Sept. 1, 1970).

14. *Id.* at 2976.

15. A. DOWNS, OPENING UP THE SUBURBS 98-102 (1973).

Determining the best teacher for each position would be a very difficult task. Agreement on what standards should be used in a free-for-all academic competition could take years. Perhaps during the long struggle to identify and agree on appropriate evaluation instruments, defenders of the current system would come to concede that an individual's performance can vary because of a myriad of factors and conditions that receive little attention under current selection procedures that place high priority on the applicant's law school grades and the prestige of that law school.

Proponents of the status quo might well maintain that no quality lawyer would sacrifice opportunities in practice to teach law if his career were subject to frequent review and the possibility of interruption by a competitor found more qualified. This is a strange position coming from those who teach and often espouse the efficiencies of a free enterprise economic system. And yet it is an argument likely to prove convincing to many.

Stability and job security are strong attractions to lawyers who enter law teaching, regardless of their color. And it is not necessary to restructure the profession in order to improve the current crisis in the status of minority-race faculty members. What is essential is that faculties of mainly-white schools be honest, for the facts are:

— Traditional qualifications are useful but do not enable accurate predictions about the performance of law teaching candidates. Many highly regarded law professors, including most in this group who are not white, did not graduate from one of the top schools or did not earn the highest grades in their schools.
— Adherence to traditional qualifications, and the refusal to consider success in practice and qualities of maturity, commitment and judgment, will limit the number of teachers of color in most law schools with the now predictable adverse consequences on the teaching performance, scholarly production, and eventually the teaching longevity of such teachers.
— Qualifications aside, law school faculty (other than those on the four traditional black schools) consider their schools as "white schools" and would resist hiring beyond a certain number of even the most qualified teachers of color.

Given these conditions, there is only one alternative to the current counter-productive policies of tokenism in minority hiring. Law faculties must sit down, determine just how many teachers of color they and their schools can accept or tolerate, and then work out a time schedule that calls for locating and recruiting that number of minority teachers

in the shortest period that budgets will permit. Those who respond that such a procedure would constitute an unconscionable stigmatizing of non-white faculty of a character as shameful as the use of "tipping points" to determine the percentage of integration of a residential community are absolutely correct. But just as policies of controlled racial occupancy enabled a degree of housing integration in areas that otherwise would have remained all-white or become all-black, so adopting similar procedures in legal education, could result in a much-needed increase in the number of truly integrated law faculties, and a far more productive and humane career for all teachers of color.

I am ever grateful to Professor Paul Freund who lent his name and considerable prestige to a statement about the positive value on the law of efforts by blacks to achieve their rights.[16] Every student of American race relations knows his statement is true. Professor Freund observed that "[t]he frontiers of the law have been pushed back by the civil rights movement in many sectors that are far broader than the interests of the movement itself."[17] And I am convinced that law schools willing and able to move beyond destructive tokenism in minority hiring to a truly representative percentage of teachers of color, will benefit in both the short and the long run.

In the short run, schools (there will not be many) willing to play pioneering roles in minority hiring policies will receive quite positive public attention even during this era of conservatism on civil rights. When I was named dean of the University of Oregon Law School, the school received far more commendation than criticism from both the media and the community. In the next few years, we were able to interest white faculty candidates with offers from other schools far above what we could afford because they viewed Oregon as a progressive school, one willing to take risks and break new ground. Any number of white students have told me they chose Oregon for similar reasons.

Admittedly, the parallels are not precise. I left Harvard Law School to become the dean at Oregon. Even on traditional criteria, I was as qualified as the other candidates. But the benefits of my presence at Oregon were not in the main based on my reputation, but on the fact that I was black and Oregon had hired me as dean. Schools will gain similar benefits if they hire a truly representative number of teachers of color with experience and potential that will be enhanced

16. FREUND, *The Civil Rights Movement and the Frontiers of Law,* THE NEGRO AMERICAN 363 (1966).

17. *Id.* at 364.

by the opportunity to work in a more supportive atmosphere than now exists. Affirmative action issues may be raised, but the judicial deference traditionally accorded university faculty hiring and promotion decisions[18] should insulate the school from successful litigation as long as no specific number of faculty slots are definitely set aside on the basis of race.[19]

In the long run, both the law school and the society will benefit from the perspective that many teachers of color have gained the hard way. As racial turbulence in our society increases, as more and more of the nation's income goes to fewer and fewer families, the need increases for new initiatives in using law to effect social reform. We simply cannot permit W. E. B. Du Bois' 1903 prediction, that the problem of the twentieth century would be the color line,[20] to retain its validity into the twenty-first century.

The presence of a nucleus of able teachers of color — black, Hispanic, Asian and Indian — working within the structure of established, main-line institutions of legal education, receiving help, support, and comment from white colleagues, could make a major difference in avoiding the domestic catastrophe that looms as large as that of a nuclear holocaust. And if, in the end, it fails, those who tried will at least have the satisfaction of having seen a new vision, taken risks to realize it, and failed, yet moved forward.

18. *See* Bartholet, *Application of Title VII to Jobs in High Places*, 95 HARV. L. REV. 945 (1982).

19. Regents of the University of California v. Bakke, 438 U.S. 265 (1978).

20. W. E. B. DU BOIS, THE SOULS OF BLACK FOLK at vi (5th ed. 1961).

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